UNITED
NATIONS

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Economic and Social Council

Distr.
LIMITED

E/CN.6/1998/WG/L.4
24 March 1998

ORIGINAL: ENGLISH

COMMISSION ON THE STATUS OF WOMEN
Forty-second session
Open-ended Working Group on the
Elaboration of a Draft Optional
Protocol to the Convention on the
Elimination of All Forms of
Discrimination against Women
2-13 March 1998
Agenda item 5

CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, INCLUDING THE ELABORATION OF A DRAFT OPTIONAL PROTOCOL TO THE CONVENTION

Chairperson's summary

1. The Open-ended Working Group on the Elaboration of a Draft Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women held a number of informal meetings to continue negotiations on the optional protocol based on the results of a first reading of the draft which had been completed in 1997, and reflected in appendix I of annex III to document E/1997/27. The Working Group requested the Chairperson to prepare a summary of the discussions held during the informal meetings for inclusion in the report of the Working Group.

2. Throughout the informal meetings, the Working Group benefited from the comments of and replies to questions by Ms. Silvia Cartwright, a representative of the Committee on the Elimination of Discrimination against Women, who participated in the Working Group as a resource person in accordance with Economic and Social Council decision 1997/227. The Working Group also benefited from the comments of a member of the Human Rights Committee who provided the Working Group with information on the practice of the Human Rights Committee under its first Optional Protocol (to the International Covenant on Civil and Political Rights). The Working Group received information from a representative of the Office of the United Nations High Commissioner for Human Rights on technical aspects of the work and practice of human rights treaty bodies under similar procedures as those contained in the draft optional protocol, and from a

representative of the Office of Programme Planning, Budget and Accounts of the United Nations Secretariat.

3. The following reflects the Chairperson's understanding of the discussions of the Working Group on the optional protocol, arranged on an article-by-article basis. Delegations requested amendments to the text from the floor, but the Chairperson wishes to note that this text was not negotiated, nor was it adopted by the Working Group.

Preamble

1. The Working Group agreed that the optional protocol would be preceded by a short, succinct preamble which reflected the international human rights framework of the United Nations. Delegations agreed that the preamble would note that the Charter of the United Nations and the Universal Declaration of Human Rights establish the principles of equality between men and women and the entitlement of all, without distinction based on sex and other grounds, to human rights. Delegations agreed that the preamble would recall the international covenants and other human rights instruments, including the Convention on the Elimination of All Forms of Discrimination against Women. It would reaffirm States parties' determination to ensure the full and equal enjoyment by women of all human rights and fundamental freedoms and to take effective action to prevent violations of these rights and freedoms. Some delegations suggested that the preamble should also recall that the Vienna Declaration and Programme of Action reaffirmed the universality, indivisibility and interrelatedness of all human rights and that it called for the introduction of the right of petition through the preparation of an optional protocol to the Convention. Some delegations also suggested that the preamble should make reference to the Beijing Platform for Action. Others suggested that these documents be addressed in a resolution.

Article 2

2. The Chairperson of the Working Group submitted a new draft of article 2 which was accepted by the Working Group as the basis for its further negotiations on this article.

3. Delegations agreed that the optional protocol should entitle individuals and groups of individuals to submit communications to the Committee. Some delegations were of the view that groups should be entitled to submit communications, while several suggested that organizations, including non-governmental organizations, should also be entitled to do so, as they also can be victims of human rights violations. Other delegations expressed the view that groups and organizations may participate in other human rights mechanisms.

4. Many delegations referred to the communications procedures in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families which entitle communications to be submitted on behalf of complainants. The practice of the Human Rights Committee, reflected in its rules of procedure, was to receive communications submitted on behalf of victims. Many delegations took note of the explanation of the representative of the Office of the United Nations High Commissioner for Human Rights with regard to the existing procedures under the International Covenant on Civil and Political Rights and the Convention against Torture in relation to communications submitted in cases where victims are unable to submit communications themselves, or when victims give consent for the submission of communications by others. These delegations were of the view that this protocol should explicitly provide that communications could be submitted on behalf of

complainants and that this element could be specified in the Committee's rules of procedure.

5. Several delegations were of the view that the parameters of the phrase "on behalf of" required clarification so as to preclude communications from unauthorized representatives with neither the consent of, nor a link to, victims. Several delegations suggested that clarification could be provided by limiting those who could claim submission of communications "on behalf of" victims to designated representatives.

6. Delegations agreed that it was important to indicate that the protocol would reflect existing communications procedures and provide that claimants should be subject to the jurisdiction of the relevant State party. Some suggested that designated representatives should also be subject to the State party's jurisdiction, while others suggested that this requirement was inappropriate.

7. Many delegations suggested that it was important to provide for communications concerning violation of rights set forth in the Convention through an act or failure to act by the State party. Other delegations were of the view that communications should be able to address violations of all the provisions of the Convention. Several delegations expressed the view that violation of rights of the Convention encompassed both acts and omissions and that a concise formulation referring to violation of rights or provisions of the Convention would be understood as including acts and the failure to act and was thus sufficient.

8. One delegation expressed the view that article 2 should include, as did the first Optional Protocol to the International Covenant on Civil and Political Rights, reference to the requirement of exhaustion of available domestic remedies which would also be addressed in article 4.

Article 3

9. Delegations recalled that article 3 of the draft optional protocol had been agreed by the working group ad referendum. Noting that article 1 of the first draft protocol had explicitly precluded reception of communications relating to States parties to the Convention that were not States parties to the protocol, delegations agreed to the addition of this formula in article 3 ad referendum.

Article 4

10. Delegations agreed that admissibility criteria would be reflected in two separate subparagraphs of article 4, that is to say, article 4 (1) would deal with the exhaustion of domestic remedies, and article 4 (2) would reflect the remaining criteria.

11. Delegations agreed to a negative formulation according to which the Committee would not consider a communication unless it had dealt with the question of exhaustion of domestic remedies, thereby making the subparagraph

more succinct. Some delegations doubted whether current language on this matter as contained for example in the Convention against Torture was appropriate within the scope of the present protocol, and were in favour of a requirement that the author of a communication demonstrate the exhaustion of domestic remedies. Others noted that the exhaustion of domestic remedies was a standard provision in other human rights instruments, and its application should be determined within generally recognized principles of international law.

12. While delegations discussed various possibilities for reflecting inadmissibility because of an abuse of the right, several suggested that this element would be further specified by the addition of the criterion of vexatiousness. It was agreed to combine lack of substantiation and manifest ill-foundedness. However, both sets of criteria, as contained in article 4 (2) (iii) and (iv), remain in brackets, with the word "vexatious" also appearing in brackets. Delegations agreed to include admissibility criteria covering prior occurrence and prior, or simultaneous, consideration by another procedure of international settlement.

13. Some delegations, while emphasizing that the principles of objectivity and impartiality which they noted were important principles of international law, needed to be maintained in the consideration of communications by the Committee suggested that, instead of those principles' being included as an admissibility criterion, they could be moved to another place within the protocol, for example, to a new article 7 (1). Other delegations noted that, while appreciating the removal of this aspect from article 4, they could not agree to its inclusion in article 7.

14. Delegations agreed to retain articles 4 (1) and 4 (2) as set out in document E/CN.6/1998/WG/L.2 with two sets of brackets in article 4 (1) and one set in the chapeau of article 4 (2), in addition to the sets of brackets around article 4 (2) (iii) and (iv). Several delegations suggested that a further paragraph should be added to the article that would provide for the consent of the victim of the violation for representative communications.

Article 5

15. Some delegations considered it inappropriate for the Committee to request a State party to take interim measures, while many pointed out that this was in accordance with established practice of human rights treaty bodies, such as the Human Rights Committee. A formulation according to which the Committee may transmit to a State party a request for interim measures was acceptable to all delegations, especially since a similar approach was used in article 7 (transmittal of views). Delegations also noted that a State party was under a general bona fide obligation to give consideration to such a request of the Committee, and that this could be reflected in a shortened article 5 (1) with the deletion of article 5 (2).

16. While some delegations expressed a preference for the deletion of all three bracketed qualifications of situations that might justify the request for interim measures, all delegations agreed to the retention of the words "as may be necessary". Delegations agreed that a reference to the preservation of the

status quo could be ambiguous, indicating preservation of a violation, and should therefore be deleted. While some delegations expressed a preference for the term "harm" in English, others pointed out that for translation into other languages, the use in English of the term "damage" would be preferable.

17. Delegations agreed that the use of interim measures did not imply a determination on the merits of a case, nor on its admissibility, and that this should be reflected in article 5 (2).

18. Article 5 (1) and 5 (2) were retained by the Working Group, with "urgent" in article 5 (1) remaining in brackets.

Article 6

19. Many delegations expressed the view that the identity of the complainant should be revealed to the State party. It was noted that practical considerations required that the State party be informed of the identity of those submitting communications to allow for the provision of information to the Committee. Several delegations suggested that claimants should be able to decide whether their identities should be revealed to the State party.

20. Several delegations noted the changing practice of the Human Rights Committee in regard to confidentiality. Some delegations expressed a preference for deleting the confidentiality requirement from article 6 (1), but others expressed the view that, while a communication was pending, only the State party, the complainant and the Committee should be apprised of the proceedings and their content.

21. While some delegations expressed a preference for a three-month time limit for submission of information by the State party, all delegations agreed on a six-month period.

22. Several delegations expressed their support for the retention of the substance of article 6 (3) in the optional protocol. Other delegations suggested that the current language of article 6 (3) was inappropriate in a human rights instrument. Several noted that the provision suggested that the Committee had an arbitral role which they considered inappropriate. Others underlined that the thrust of this provision was to encourage reconciliation and mediation, rather than arbitration or quasi-judicial proceedings.

23. The Working Group agreed to retain article 6 (1), with the term "confidentially" remaining in brackets. Article 6 (2) was adopted ad referendum. Article 6 (3) remains unchanged.

Articles 7, 8 and 9

24. Many delegations suggested the deletion of the requirement that only written information may be used by the Committee in considering a communication, pointing in particular to the constraints that women in developing countries might face in this regard. Some suggested an explicit reference to recorded

information. Others maintained that the procedure should be based on written information. While several delegations were of the view that the Committee should be entitled to receive information from "other sources" which would be transmitted to the State party and the author of the communication, others pointed to the importance of verifying these sources. Some delegations indicated that they could accept other sources if these were further specified.

25. Article 7 (2) had been agreed to ad referendum in 1997.

26. Some delegations expressed the view that article 7 (2) bis would encourage the dialogue between the Committee and the State party, and argued that a State party was entitled to be present at proceedings of the Committee involving that particular State party. Other delegations noted that resource implications of such a provision, which would also preclude authors of communications and their representatives' taking advantage of a similar opportunity. Several delegations noted that the Human Rights Committee did not grant States parties or complainants access to its proceedings.

27. Article 7 (3) was adopted ad referendum in a shortened version.

28. As many delegations recognized the desirability of setting out provisions on follow-up currently contained in articles 7 (3), 8 and 9, including alternatives, in a streamlined form, it was agreed to merge these articles and to delete the original drafts. Recognizing the need for both short- and long-term follow-up to the Committee's views and recommendations, if any, many delegations agreed that the State party should provide a first follow-up response to the Committee's views within six months on any action taken. In light of constraints that might be present in a State party, some delegations requested a qualification of the six-month time period. Others pointed out that since no detailed reply on completed actions would be required at this short-term stage, but that an indication of initiated action and planned steps would suffice, they could not agree to such a qualification. Delegations also affirmed that this article, including the time period for the submission of information to the Committee, would apply only to the follow-up phase after the Committee's adoption of views, and was not linked to article 5.

29. Delegations agreed that the Committee would have a long-term role in monitoring follow-up to its views on communications, including through the inclusion of relevant information in the periodic reports States parties are required to submit under article 18 of the Convention. Article 7 (5) was adopted ad referendum.

Article 10

30. Several delegations, while noting their support for an inquiry procedure, stated that, in their view, the Committee already had the power under its current mandate to deal with situations of serious or systematic violations. In this regard, they encouraged the Committee to develop its mandate under article 18 of the Convention, especially in regard to exceptional reports. It was also noted that the proposed inquiry procedure would strengthen and expand

the Committee's mandate in this regard. Some doubt about the desirability of including an inquiry procedure in the optional protocol was also voiced.

31. As to whether an inquiry procedure could be based on the Committee's receipt of information about what was termed "serious [and] [or] systematic violation", several delegations stated that, while they preferred "or", they would also be able to accept "and". It was argued that the use of the word "or" would not achieve the objective of the inquiry procedure. Others were of the view that the reverse was the case. Single cases of violations could be serious, but they should be dealt with under the communications procedure. Those who supported the retention of "and" noted that in order for an inquiry by the Committee to be initiated, allegations of violations needed to be both serious and systematic.

32. Many delegations expressed the view that the words "with the consent of" in article 10 (2) and "the consent ... of" in article 10 (5) were redundant, while others emphasized the importance of this explicit requirement. Several delegations were of the view that a provision under this article allowing for visits to the territory of the State party should be retained, stressing that such visits could only take place with the agreement or consent of the State party.

Article 11 bis

33. Recognizing that while many delegations favoured the inclusion of an inquiry procedure in the optional protocol, others were reluctant to provide the Committee with such a mandate, the Chairperson introduced a provision according to which States parties would, upon signature, ratification or accession to the optional protocol, be in a position to declare that they did not recognize the competence of the Committee under its articles 10 and 11 (the so-called opt-out clause).

34. Delegations welcomed this proposal as a good basis for further discussions on articles 10 and 11. Some delegations proposed that, instead of an opt-out procedure, an opt-in procedure should be included. While noting their preference for an opt-in procedure, some also expressed their flexibility in this regard. Other delegations noted that in principle, and to ensure the integrity of the optional protocol, such a provision should not be required at all. In this regard, some delegations noted the link between this proposal and the issue of reservations and that they could only consider an opt-out procedure on the basis of a clause precluding reservations. Others suggested that the question of the opt-out provision should not be linked to the issue of reservations.

Article 12

35. Some delegations were of the view that article 12 of the protocol was not required because States parties to the protocol would be obliged to ensure that its procedures were accessible and to cooperate with the Committee and because

the texts of existing international procedures did not include a similar provision.

36. Many delegations were of the view that an article emphasizing States' obligations in this regard was desirable, but that this article should be put in positive terms. Several delegations suggested that the State party should be called upon to cooperate in the effective exercise of the right to submit communications or information to the Committee. Others suggested that this right should be facilitated, promoted or supported. A number of delegations were of the view that it was undesirable to refer to the protocol as creating rights and it was preferable to provide that States parties would respect the procedure provided by the protocol.

37. Many delegations suggested that the protocol should provide that the State would cooperate with the Committee at all stages of its proceedings under the protocol, but noted that this obligation would be implied in the absence of such a provision.

38. Some delegations suggested that the protocol should explicitly provide that States parties would undertake to take appropriate steps to protect those using the protocol from interference and reprisal.

Article 13

39. Delegations recalled that article 13 had been adopted ad referendum.

Article 14

40. Many delegations stressed the importance of wide knowledge of and publicity for the protocol, its procedures and the conclusions of the Committee in this context. Several noted the importance of ensuring wide dissemination of the jurisprudence of the Committee. Several noted that provisions relating to knowledge of and publicity for treaties were not included in existing instruments providing communications procedures, while others noted that article 42 of the Convention on the Rights of the Child made such provision, as did the rules of procedure of the Human Rights Committee.

41. A number of delegations expressed the view that a simple formulation relating to publicity would be appropriate and that this should address the optional protocol and the Convention. Several expressed the view that this could be accommodated by mention of the protocol, which would be enough to make known its procedures.

42. Many delegations agreed that it was important for women to be aware of the Convention and the protocol, but cautioned against a provision that would involve onerous obligations, including of a financial nature, for States parties. Several delegations were of the view that a provision of this nature was unnecessary and inappropriate, and that States parties that had not been subject to the procedures set forth in the protocol should not have obligations with respect to publicizing proceedings.

Article 15

43. Several delegations noted that in light of article 19 of the Convention on the Elimination of All Forms of Discrimination against Women, article 15 of the protocol was redundant. Many delegations expressed the view that a specific reference to the Committee's powers with regard to rules of procedure should be included in the protocol for the purposes of clarity. Delegations adopted the article ad referendum.

Article 16

44. Possible implications of the adoption and entry into force of the optional protocol with regard to the Committee's requirements for meeting time and resources were discussed. In this regard, the financial regulations and rules of the United Nations, in particular those applying to the preparation of the proposed programme budget by the Secretary-General and its review and approval by the General Assembly following the consideration of the reports of the financial and budgetary committees, were noted. While there was recognition that to enter into any particular aspect of possible implications would be premature, it was pointed out that the Committee's responsibilities under the optional protocol would have implications for the Committee's meeting time. In this regard, it was suggested that the recent amendment of article 20 (1) of the Convention could be reflected in the optional protocol. Possible resource implications with regard to the Secretariat's servicing of the Committee would also have to be addressed by Member States in due course in accordance with established regulations and rules.

45. Note was taken of the proposed new paragraph on resources, introduced by the Chairperson, which restates article 17 (9) of the Convention on the Elimination of All Forms of Discrimination against Women.

46. Following consideration of the resource issues by the Working Group, a proposal was made by the Chairperson to remove provisions pertaining to resources, including meeting time, from the text of the optional protocol and to have these elements reflected in the resolution by which the finalized text of the protocol would be adopted. Pending further discussion, the paragraphs were retained in brackets.

Article 17

47. Delegations adopted article 17 of the draft protocol ad referendum.

Article 18

48. While several delegations expressed the view that the optional protocol should enter into force after the fifth instrument of ratification or accession was lodged with the Secretary-General, they were willing to join the many delegations who favoured entry into force after 10 ratifications or accessions.

A number of delegations, arguing for consistency with the threshold established in the Convention, were of the view that 20 should be required.

Article 19

49. Several delegations were of the view that this provision was a restatement of article 29 of the Vienna Convention on the Law of Treaties and suggested its retention. A number of delegations noted that an equivalent provision was not to be found in the Convention on the Elimination of All Forms of Discrimination against Women. Delegations agreed to delete this article from the protocol.

Article 20

50. Many delegations recalled that reservations to human rights treaties, consistent with the Vienna Convention on the Law of Treaties, and not incompatible with the object and purpose of the treaty, were permissible under international law and might be appropriate in certain circumstances.

51. Recognizing that the purpose of the protocol would be to assist women in realizing their rights under the Convention, but that there were, however, a large number of reservations to the Convention itself, many delegations supported the inclusion of an explicit provision prohibiting reservations, which they noted was also compatible with international law. The optional and procedural nature of the protocol was stressed, as well as the interrelationship among the provisions of the protocol, the effective functioning of which would be undermined if reservations to any of its provisions were permitted.

52. A number of delegations noted that, while several provisions of the protocol, such as article 11 bis, had been drafted to address the concerns of some delegations that might otherwise have resulted in reservations, several provisions of the protocol had been agreed to by a number of States on the understanding that a provision prohibiting reservations would be included. Some delegations expressed the view that if reservations were permitted, then article 11 bis, about which there was no agreement, would not be necessary, and more States might accept the competence of the Committee to conduct inquiries.

53. A number of delegations indicated that a prohibition on reservations could only be accepted when the balance of the protocol had been agreed. Several suggested that a provision prohibiting reservations might discourage States from ratifying or acceding to the protocol. Some delegations argued that certain States might be willing to accept all substantive obligations established by the protocol, but unable to accept minor obligations. In such cases, a provision precluding reservations would prevent such States from becoming party to the protocol. These delegations suggested the inclusion of a provision allowing for reservations permissible under the Vienna Convention on the Law of Treaties or the setting out of no provision relating to the issue, which would subject the protocol to the regime of that Convention and preclude reservations that were inconsistent with the protocol's object and purpose.

54. Several delegations acknowledged difficulties in respect of examining the question of reservations at the present stage of consideration of the protocol, but expressed the wish to address the issue once the draft protocol was consolidated. Several took note of the strong sentiments expressed in the Working Group with respect to the prohibition of reservations in light of the subject matter of the Convention and agreed to take these sentiments into account as the draft reached finalization.

55. A number of delegations noted that human rights treaties rarely contained explicit prohibitions on reservations and that no instruments establishing communications procedures incorporated such a provision. Noting that their Governments did not envisage specific reservations to the protocol, several delegations expressed serious concerns about the long-term implications of a complete prohibition of reservations in a human rights instrument. Despite these concerns, some delegations indicated a willingness to discuss a wide variety of options with respect to discouraging or otherwise limiting reservations to the protocol short of an absolute ban of the type contained in article 20.

56. A large majority of delegations argued, nevertheless, that the protocol was an exceptional case which justified a complete prohibition on reservations. Recalling that the underlying aim of the protocol was to assist women in realizing their rights under the Convention, those delegations stressed with great passion that reservations could defeat the purpose of the protocol.

Articles 21, 22, 23 and 24

57. Delegations adopted these articles ad referendum.